land or a particular interest only. A person whose interest extends only to a specific portion of a piece of land is not entitled to enter a caveat over the whole of the land. The interest of the plaintiff in the present case before me extended to only a portion of the land in Lot 947 and her entry of a caveat against the whole of the land was, therefore, null and void and of no effect. The agreement of 1st April, 1964, did provide that the plaintiff, her employees, agents and customers shall have access to the rear portion of the premises and have the use of the kitchen, bathroom and lavatory but this privilege, in my view, did not amount to anything more than a mere licence which gave the plaintiff no right in the nature of an easement nor to any registrable interest of any kind under the provisions of the National Land Code. The Land Code provides for the entering of a private caveat to enable the caveator to protect his interest until his claim is adjudicated upon by the court. The entry of a caveat, nevertheless, is a blot on the title to the land concerned and the court will not permit that blot to be any larger than what the caveator is entitled to enter.

I, therefore, hold that the plaintiff whose claim is restricted to only a portion of the land is not entitled to enter a caveat over the whole of the land comprised in Lot 947 and I order that the caveat be removed forthwith.

Costs of the proceedings to the defendant.

Order accordingly.

Solicitors: *Atma Singh Gill & Gill; P. S. Maniam & Co.*

CENTRAL MALAYSIAN FINANCE BHD. v. LOKE KOK LAI

[O.C.J. (Hashim Yeop A. Sani J.) September 18, 1974]
[Kuala Lumpur — Originating Summons No. 191 of 1974]

Land Law — Charge of land as security for loan — Default in payment of instalments — Notice given in Form 16E — Demand for aggregate sum consisting of balance of principal and accumulated interest — Agreement in memorandum of charge for notice to be given under s. 254 of National Land Code — Whether notice valid — National Land Code, ss. 253, 254, 255 and 257(1).

The respondent had charged certain lands to the applicant as security for a loan of $1.6 million together with interest thereon. By the said charge the respondent agreed to repay on demand the balance sum which on the respondent's account was due and owing to the applicant in accordance with the terms of the said charge. It was also agreed that in the event of default, the applicant would give the respondent notice under section 254 of the National Land Code. The respondent having defaulted in the payment of his instalments, the applicant issued a notice in Form 16E of the National Land Code demanding payment of the sum of $1,419,749.88 and a further sum for interest to the date of payment or realization. Subsequently the applicant applied for an order for the sale of the land. One of the grounds of opposition by the respondent was that the applicant had used the wrong notice under the National Land Code.

Held: (1) in this case as the sum sought to be satisfied was the aggregate sum consisting of the balance of the principal sum together with interest accumulated as at that date the applicant should have used Form 16D and not Form 16E;

(2) the application was also defective on the grounds that the exact amount claimed was not specified in the application;

(3) the applicant covenanted to proceed in the first instance under section 254 of the National Land Code and therefore could not seek to act under section 255 of the Code without first issuing a notice of default.

Cases referred to:-

(1) *V.A.M. Hussain* v. *B.P. Malaysia Sdn. Bhd.* [1970] 2 M.L.J. 69.

(2) *Mary Michael* v. *United Malayan Banking Corporation* [1971] 1 M.L.J. 172.

ORIGINATING SUMMONS.

Ong Tatt Poh for the applicant.

K. K. Chong for the respondent.

Hashim Yeop A. Sani J.: This is an application for an order for sale under section 256 of the National Land Code 1965 by the Central Malaysian Finance Berhad in respect of land held under Certificate of Title No. 3104, Lot No. 1219, Mukim of Triang, in the district of Temerloh, Pahang, belonging to the respondent Loke Kok Lai and charged to the applicant under a first charge registered in the register of Land Office, Pahang, of Presentation No. 12250, Volume XV, Folio No. 51, to satisfy the sum of $1,419,749.88 due and payable as at 15th April, 1974 "together with a further sum being additional interest at the rate of 12% per annum with yearly rests shall be added thereon as from the 16th day of April, 1974, to the date of payment or realisation."

According to the affidavit of the applicant affirmed on 22nd May, 1974, a memorandum of charge of the said land in favour of the applicant was made by the parties as security for a loan of $1.6 million advanced by the applicant to the respondent together with interest at the rate of 10 per cent. with yearly rests in accordance with the terms of the said charge — "Exhibit A1" of affidavit. By the said charge the respondent is *inter alia* to repay on demand the balance sum which on the said respondent's account is due and owing to the applicant in accordance with the terms of the said charge. By virtue of the power given to the applicant by clause (3) of the annexure contained in the said charge the applicant had on the 14th day of June 1973 increased the rate of interest to 12% per annum with yearly rests. The respondent had defaulted in the payment of his instalments and after repeated reminders given by the applicant the respondent still failed to pay the instalments due as arranged. On or about the 18th of April 1974 the applicant caused a notice in Form 16E of the National Land Code 1965 to be issued to the respondent through its solicitors demanding payment of the sum of $1,419,749.88 as at 15th April 1974 with interest accruing within one month from the date of service failing which an order of sale would be applied for.

The respondent opposes the application on a number of grounds. Firstly, the respondent challenged the use of Form 16E and that therefore the applicant had used the wrong notice under the National Land Code, as not only the principal but also the interest were due and payable. Secondly, it was the contention of the respondent that the applicant had charged compound interest and interest at a rate more than 12% per annum thereby infringing the exemption grant-

ed by the Minister for Local Government under the Moneylenders Ordinance 1951. Finally, the respondent also challenged the keeping of accounts by the applicant and contends that the contents of the said notice was therefore incorrect by reason of wrong accounting — see affidavit of respondent affirmed on 27th August 1974, paragraphs 9 and 10. Apparently if this allegation of the respondent is right the contents of the said notice is therefore incorrect and misleading thereby rendering the said notice defective and of no effect.

In my view the decision on this application can be made solely by considering the grounds in the first objection. The notice given by the applicant is notice in Form 16E of the National Land Code — see Exhibit "A2" of the affidavit of the applicant affirmed on 22nd May 1974. In this respect two Federal Court decisions should be considered and they are *V.A.M. Hussain* v. *BP Malaysia Sdn. Bhd.*[1] and *Mary Michael* v. *United Malayan Banking Corporation Bhd.*[2] In *V.A.M. Hussain's* case the appeal was against the order for sale granted by the High Court. In that appeal the parties had agreed that the respondent buy the appellant's land for $90,050 in the event that the Government approve the building plan for a petrol station. The parties had also agreed that the appellant be given an advance of $45,000 and that his land be charged to the respondent. The advance was made and the land was accordingly charged. Subsequently the building plan was rejected and the respondent applied for an order of sale to satisfy the advance together with interest at the rate of 8% per annum from the date that the notice was thought to have reached the appellant to the date of payment. The order for sale was granted and the appellant appealed. In the judgment of the Federal Court Suffian F.J. (as he then was) states: —

"It is then argued that the notice given to the appellant on Form 16E was wrong and that it should have been on Form 16D. There is no merit in this argument. Form 16D should be used, in the words of section 253 of the National Land Code, only where there has been 'a breach by the chargor of any of the agreements on his part', and the object of using that form is to specify the breach in question so as to give the chargor an opportunity of remedying the breach. Here BP do not allege that there has been a breach by the appellant of any of his agreements, which breach is within the appellant's power to remedy. All that BP allege is that building permission could not be obtained. That being the case, clause 13 of the agreement springs into play, the agreement automatically came to an end and it was open to BP to demand repayment of the $45,000. This they did and according to section 255(1) of the Code where the principal sum secured by a charge is payable on demand the proper notice to issue should be on Form 16E....

Further it is said that Form 16E is only for demanding the repayment of principal only and the inclusion of interest on it was a substantial variation that made the notice defective. I do not think that the inclusion of interest made the notice defective...."

It seems to me that the facts in *V.A.M. Hussain's* case are distinguishable from the facts in the instant case in that the sum due and payable in the instant case is not the principal sum but the sum due as at 15th April 1974 which according to the statement of account under the name of the respondent kept by the applicant (see Exhibit "A" in the affidavit of the applicant affirmed on 30th August 1974) reflects the actual balance of the account of the respondent consisting of the balance of the original amount advanced together with interests accumulated so far after deducting the various instalments already paid by the respondent. According to Exhibit "A" the instalments paid by the respondent were of various amounts which (except for instalment paid on August 1st 1972 which was payment towards interest only) were payments towards both principal and interest.

In *Mary Michael's* case, the High Court had given judgment ordering the land to be sold by public auction but held that only interest at 9.6% could be charged on the advance made. The chargor appealed. In that case the appellant had charged certain lands to the respondents as security for overdraft facilities to the extent of $35,000 with interest thereon at 9.6% per annum. The respondents caused a notice in Form 16D of the National Land Code to be served on the appellant demanding payment of the sum of $35,971.09 being the amount due as at July 26, 1968 with interest thereon at 11%. The appellant failed to comply with the notice and the respondent thereupon brought an application for the sale by public auction of the land. The appellant at the trial opposed the application on the grounds (a) that the purported notice in Form 16D served on her and issued under section 254(1) of the National Land Code was null and void, and (b) that the bank had no right to increase the rate of interest on the loan.

Azmi L.P. in the judgment of the Federal Court states as follows: —

"It is to be observed that a notice in Form 16D applies to *any charge*, so that it can validly be used even in the case of a charge where the principal sum is payable on demand, even though Form 16E is specially designed for this purpose. This would be particularly true of a charge where the principal sum bears interest and the chargor is in default of payment of interest as stipulated in the charge. If there is no interest payable on the principal sum it is open to the chargee to give a notice outside the provisions of the Code either orally or in writing and, in the event of non-compliance with this notice, then to issue a notice in Form 16D on the ground that the chargor is in default. In other words, in the case of a charge where the principal sum is payable on demand and there is also a stipulation as regards payment of interest thereon, the chargee can apply for sale of the charged land either on the ground that the principal sum secured by the charge is payable on demand or on the ground that there has been a default in payment of interest. In either case a notice in Form 16D would be a valid notice.

A notice in Form 16E is both a notice of demand for payment as well as a notice that in default of payment within one month of the service of the notice the chargee will apply for an order of sale. This is clear from the wording of section 255(1) of the Code which says that in such a case no further notice in Form 16D is required. In other words, whereas Form 16D can be used whether or not the principal sum is payable on demand Form 16E can be used only if the principal sum is payable on demand.

In the *Eliathamby* case the charge provided for repayment of the principal sum on a specific date and for payment of interest every month on a certain date, and, in case of default in the payment of instalments due on account of interest, the whole amount then owing under the charge was to become immediately due and payable. The chargor made default. The chargee issued a notice in form 16E which is prescribed under section 255 of the National Land Code. Sharma J. held quite rightly that as the principal sum secured by the charge was not payable on demand the notice in Form 16E was bad, and therefore dismissed the application for sale. In the present case, although the principal sum was payable on demand, the chargee was seeking to recover also the interest which had become due and payable, so that a notice in Form 16D was the appropriate notice."

Because the facts in *V.A.M. Hussain's* case are distinguishable from the instant case *Mary Michael's* case would apply. In the instant case the sum sought to be satisfied is the aggregate sum consisting of the balance of the principal together with interests accumulated as at that date. Therefore Form 16D should have been used by the applicant and not Form 16E.

In my view the application is defective also on the grounds that an exact amount is not specified in the application. The sum of $1,419,749.88 alleged to be due as at 15th April 1974 reflects as I pointed out earlier the balance of the principal together with interest accrued so far but the application also asks for a further sum (unspecified) which is alleged to constitute additional interest at the rate of 12% per annum with yearly rests as from the 16th day of April 1974 to the date of payment or realisation. Section 257(1)(c) of the National Land Code provides that every order for sale shall specify the total amount due to the chargee at the date on which the order is made. The question what would happen if the chargee in *Mary Michael's* case had issued the notice in Form 16E was raised by Gill F.J. (as he then was) in his observations at page 173. He said the chargor could perhaps have successfully argued that the form was inapplicable on the ground that the chargee was also including in the notice the amount of interest due on the charge. It is to be observed that neither in section 255(1) of the National Land Code nor in the form itself is there any mention of interest. But this question did not fall to be decided in *Mary Michael's* case because the chargee in that case had chosen to issue a notice in Form 16D which as the Lord President pointed out he was entitled to do.

Clause 1 of the memorandum of charge in question (Exhibit "A1" in the affidavit of the applicant affirmed on the 22nd of May 1974) reads: —

"1. The Chargor(s) will on demand covenant to pay to the Chargee

(a) the sum of Dollars One Million Six hundred thousand ($1,600,000.00) (hereinafter referred to as 'the Loan') together with interest thereon (as well after as before any court order or judgment) at the rate of ten per centum (10%) per annum (hereinafter referred to as 'the Interest Rate');

(b) all other sums and moneys as are or may become payable by the Chargor(s) under this Charge and, without limiting the generality of the foregoing, in particular all the costs charges expenses and other sums and moneys mentioned in Clause 31 hereof. . . ."

It is clear that the covenant to pay set out in clause (1) of the deed is outside the scope of section 255(1) of the National Land Code. The respondent defaulted in the payment of instalments in the terms of clause (5) of the deed. It is clearly set out in clause (33) of the deed that in the event any breach by the chargor of any "agreement, covenants, terms, stipulations and undertakings" provided in the deed accruing and continuing for a period of not less than seven days it shall be lawful for the chargee forthwith to give *notice to the chargor under section 254 of the National Land Code.* To my mind it is obvious therefore that the applicant himself had covenanted to proceed in the first instance under section 254 of the National Land Code although under the proviso to that clause it is provided that the chargee shall not be deprived of its rights under section 255 of the National Land Code. The intention of clause (33) of the deed is that the parties themselves agreed that the procedure under section 254 or section 255 of the Code shall apply as circumstances may require.

For the above reasons I dismiss the application with liberty to reapply after notice in Form 16D is served on the respondent. Costs to respondent in any event.

Application dismissed.

Solicitors: *Ong & Co.; Presgrave & Matthews.*

ISMAIL BIN AWANG v. PUBLIC PROSECUTOR

[A.Cr.J. (Abdul Razak J.) September 22, 1974]
[Kuala Trengganu — Criminal Appeal No. 7 of 1974]

Criminal Law and Procedure — Charge of using a motor vehicle as a public service vehicle without licence — Penal provision — To be strictly construed — Evidence of observations by police — Contradiction in material particulars — Evidence of defence throwing doubts on prosecution evidence — Road Traffic Ordinance, 1958, ss. 74(1), 92(1) and 144.

In this case the appellant had been convicted of the offences of using a motor vehicle as a public service vehicle and failure to have it covered by third party insurance. The evidence adduced against the appellant at the trial consisted of observations made by the police over a period of twenty-five days. Although two police constables were detailed to carry out the observations, only one of them gave evidence in court. The appellant was eventually arrested and he and the passengers in the motor vehicle were taken to the police station. There were contradictions in material particulars in the evidence of the police constable and on the other hand the passengers found in the motor vehicle gave evidence and supported the appellant's evidence that no money was paid.

Held: the defence evidence in this case had thrown doubts on the prosecution evidence and the conviction of the appellant should therefore be quashed.

Cases referred to:-

(1) *R.* v. *Prater* (1960) 44 Cr. App. R. 83.
(2) *Reg.* v. *Birtles* [1969] 1 W.L.R. 1047.

CRIMINAL APPEAL.

Porres R. Royan for the appellant.

Datuk Abu Mansor (Deputy Public Prosecutor) for the respondent.

Abdul Razak J.: This is an appeal against the decision of the learned magistrate given on the 17th February, 1974, wherein the appellant was charged for offences under section 92(1) and 74(1) of the Road Traffic Ordinance. He was found guilty of both the charges and fined $200 and $100 respectively. He was disqualified from driving and his driving licence was suspended for a period of one year. His motor vehicle was forfeited.

The facts of the case were quite simple. It was one of those common cases where pirate taxis were said to be used as public service vehicles and observations were made by the Police to detect the crime. On this occasion two police constables were detailed as usual to carry out the mission on the instruction of his superior. However, only one of them